

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1234

To be argued by
SARAH S. GOLD

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1234

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTHONY A. TORRES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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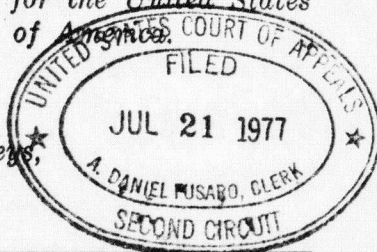




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ANTHONY A. TORRES,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony Anibal Torres appeals from a judgment of conviction entered on April 1, 1977, in the Southern District of New York, after a two-day bench trial before the Honorable Marvin E. Frankel.

Indictment 77 Cr. 178, filed March 7, 1977, charged Anthony Anibal Torres in two counts with assault and assault with a dangerous weapon upon a federal official in violation of Title 18, United States Code, Section 111.

Trial commenced on March 31, 1977, and ended on April 1, 1977, with the conviction of Torres on both counts.

On May 10, 1977, Torres was sentenced to six months imprisonment on Count One and five years probation on Count Two.

Statement of Facts

A. The Government's Case

The Government in its direct case proved by overwhelming evidence, including the testimony of six eyewitnesses, that Torres twice assaulted a corrections officer on December 2, 1976, at the Metropolitan Correctional Center ("M.C.C.") in Manhattan.

On December 2, 1976, at around 1 p.m., Torres was being returned by a United States Marshal to the M.C.C. from a court appearance in the Southern District of New York. Torres was incarcerated in the M.C.C. on \$250,000 bail from a complaint filed on November 17, 1976, charging him with a conspiracy to kill federal officers and foreign officials. In addition, an indictment had been returned by a grand jury on November 24, 1976, charging Torres with making false statements to agents of the Alcohol, Tobacco and Firearms Agency. In fact, on December 2, 1976, at the time of the events resulting in the instant conviction, Torres had just been returned to the M.C.C. from his arraignment on that indictment.

While Torres was in the Receiving and Discharge Unit of the M.C.C. awaiting change into his prison uniform, a verbal altercation occurred between Corrections Officer Hugh Herbert and an inmate, William Wilson. Torres told inmate Wilson not to take such abuse and then proceeded to physically assault Officer Herbert. (Tr. 12-13, 41-43, 75, 89-90).^{*} A struggle ensued. Torres was eventually restrained and handcuffed by two officers and a United States Marshal. Then, the officers and the

^{*} Citations to "Tr." refer to pages in the transcript of the trial.

marshal escorted Torres from the Receiving and Discharge Unit to a nearby holding pen. As Officer Herbert opened the cell door and stepped back, Torres raised his arms and hit Officer Herbert across the mouth with the handcuffs, knocking Herbert back against a side wall. (Tr. 17, 44-45, 65, 77-78, 91-93, 108-9). Torres was again restrained and placed in the holding pen. He was later examined in the M.C.C. Hospital and found to be without any injury. Officer Herbert sustained severe injuries to his mouth and four front teeth. (Tr. 20A-21). Herbert was out of work for 17 days after the assault. (Tr. 21).

B. The Defense Case

The defendant testified and called four inmates to testify in his behalf.

Torres testified that he struck Officer Herbert intentionally but that he acted in self-defense. (Tr. 131-32). According to Torres, after the verbal altercation occurred in the Receiving and Discharge Unit, Officer McGowan held Torres from behind while Officer Herbert punched him repeatedly in the stomach. (Tr. 130). Then, just before Torres was placed in the holding pen, Officer Herbert, again punched him, this time behind the ear. (Tr. 131). Torres testified that he then struck Officer Herbert intentionally, but in self-defense. (Tr. 131, 150-51). Torres further testified that he was then taken to the prison hospital, where, rather than being examined, he was further assaulted. (Tr. 134-35, 153).

Inmate Wilson testified on behalf of Torres that he saw Officer Herbert go towards Torres in the Receiving and Discharge Unit but did not see who hit first. (Tr. 222, 227-28). A second inmate, Kim Crashaw, testified that he saw Officer Herbert punch Torres behind the ear

next to the holding pen. Cranshaw testified further that he then saw Torres hit Officer Herbert in the mouth with his handcuffs. (Tr. 178-180). Two other inmates testified that later the same day they saw Torres, and he was bleeding. (Tr. 186-87, 201).*

C. The Government's Rebuttal Case

In rebuttal, the Government proved that Kim Cranshaw had not seen any alleged assault by Officer Herbert on Torres. On December 2, 1976, the date of the two assaults, Cranshaw had been on trial in the United States Courthouse, Southern District of New York, all day and the jury had deliberated until 10:24 p.m. that evening. (Tr. 194, 249). Inmate Wilson, who testified about the incident in the Receiving and Discharge Unit, had told an agent of the Federal Bureau of Investigation a week after the assault that it was Torres who had assaulted Officer Herbert. (Tr. 236-7). Finally, Warden Larry Taylor testified that he himself had seen Torres in the prison hospital after the assaults and that Torres was neither injured nor bleeding. (Tr. 244-45).

* The bleeding was never connected by the defense to the two assaults proven by the Government. In fact, Torres himself testified that he was bleeding from an incident in the prison hospital which occurred after both of the assaults charged. (Tr. 134-35, 153).

ARGUMENT

POINT I

The Handcuffs Were Used By Torres As A Dangerous Weapon.

Torres asks this Court to "modify appellant's conviction on the second count to simply assault." * (Appellant's Br. 11). Torres appears to make two arguments in support of the requested relief. First, Torres contends that as a matter of law, handcuffs cannot be a dangerous weapon. Second, Torres, conceding the assault upon Officer Herbert, argues that he did not intend to use the handcuffs as a dangerous weapon.

These contentions are wholly without merit. Judge Frankel, sitting as the jury, made a clear finding with respect to Torres' intent.

I don't think, having in mind the nature of the law and the nature of the physical facts, that there is any serious question about what ought to be deemed the intent of this defendant to use those handcuffs as a dangerous weapon and I find that he truly did. He was aware he had them on and aware of the way that the blow was being delivered, and he was aware that the handcuffs striking against somebody's face would function, and

* The only distinction in 18 U.S.C. § 111 between assault and assault with a deadly weapon is the potential sentence. The maximum sentence for assault is three years imprisonment and a fine of \$5,000. The maximum sentence for assault with a deadly weapon is 10 years imprisonment and a fine of \$10,000.

Torres has conceded the assault and only contests the use of a dangerous weapon. However, since he received a sentence of only five years probation on Count Two, he cannot show any prejudice from the conviction for assault with a dangerous weapon.

I find he indeed intended they would function as the dangerous weapon that they were. (Tr. 276-77).

There is no question but that handcuffs may come within the statutory language of a "dangerous weapon".

While it may not be a dangerous weapon per se, almost any object 'which as used or attempted to be used may endanger life or inflict great bodily harm' or which, as it is sometimes expressed, 'is likely to produce death or great bodily harm,' can in certain circumstances be a dangerous weapon. . . . Not the object's latent capability alone, but that, coupled with the manner of its use, is determinative. [citations omitted].

United States v. Johnson, 324 F.2d 264, 266 (4th Cir. 1964) (chair found to be dangerous weapon in conviction under 18 U.S.C. § 113(c)). See *United States v. Williamson*, 482 F.2d 508 (5th Cir. 1973) (automobile may or may not be a dangerous weapon depending upon the circumstances); *United States v. Farries*, 459 F.2d 1057 (3d Cir.), cert. denied, 409 U.S. 88 (1972) (telephone and "shod foot" both found to be dangerous weapons); *United States v. Davis*, 429 F.2d 552 (8th Cir. 1970) (unloaded gun); *United States v. Daniels*, 421 F.2d 155 (4th Cir. 1970) (metal fence post). In this case, the trial record clearly supports Judge Frankel's finding that the handcuffs were used and intended to be used as a dangerous weapon. Torres claims on appeal that he was still "in a highly agitated state" at the time of the second assault and that he, therefore, used the handcuffs "accidentally rather than intentionally". (Appellant's Br. 10). As this Court has noted, "the simple answer is that this argument was rejected by the jury"—here, the trial court—"and the verdict was amply supported by the record." *United States v. Cavallaro*, 533 F.2d 300, 303 (2d Cir.

1977). Indeed, Torres' argument finds no support whatever in the record.

After the first assault, the evidence showed that Torres was completely calm and walked along with the officers to the holding pen. (Tr. 16-17, 34, 108). One officer testified that when he arrived in the Receiving and Discharge Unit after the first assault, Torres was "just standing there quietly, handcuffed, nothing going on, all appeared quiet". (Tr. 108). Then, at the holding pen as Officer Herbert stepped back to let Torres pass by, Torres took a step, raised his arms up, swung at and hit Officer Herbert very hard across the mouth with the handcuffs. (Tr. 17, 33-34, 45, 57-58, 77-78, 83-84, 109-09). Officer Herbert, on cross-examination, testified that the second assault caught him off guard because Torres was so calm.

Q. Did you see his body turning toward you?

A. It happened so fast I didn't know what happened, sir. All I know is I got hit very hard in the mouth.

Q. It happened faster than when you saw his hands were coming at you earlier [referring to the first assault] and you were able to get his hand in mid-air?

A. When he was coming at me I was ready for it. He told me he was coming to kick my ass and I was standing there. This time I was just holding door, because he was quiet and never said a word.

Q. This is about two or three minutes after the first incident?

A. The man was calm, quiet. (Tr. 33-34).

Thus, the record clearly supports Judge Frankel's finding that Torres intended to and did use the handcuffs as a dangerous weapon.

POINT II

The Testimony Presented To The Grand Jury Was Proper.

Torres argues that one question asked of one witness who appeared before the Grand Jury in this case was "so prejudicial and inflammatory" that it requires dismissal of the indictment.* (Appellant's Br. 11). This argument is totally frivolous.

On Tuesday March 22, 1977, Torres' counsel, Richard Rosenkranz, Esq., received all discovery matters from the Government furnished to him pursuant to 18 United States Code, Section 3500.** Among the materials furnished were copies of the testimony before the grand jury of three eyewitnesses to the two assaults, including that of the victim, Officer Hugh Herbert.

On Friday, March 26, 1977, after the close of the Government's case and after the testimony of four of the five defense witnesses, Mr. Rosenkranz first raised this motion to dismiss the indictment. (Tr. 216-18). Judge Frankel denied the motion at that time and again denied the motion when raised after trial.

* Q. Are you aware, sir, that Mr. Torres was arrested on or about November 17, 1976, for conspiracy to kill federal officers and foreign officers?

A. Yes sir.

** Mr. Rosenkranz states in his appellate brief that he received the 3500 material on Wednesday, March 23, 1977, the day before trial. However, on March 25, 1977, when his recollection was fresher, he stated to Judge Frankel that he had received the 3500 material on Tuesday, March 22, 1977. (Tr. 217). His failure over the course of several days even to notice a statement that he now asserts was "highly prejudicial, inflammatory, and erroneous evidence" (Brief at 11) itself belies his claim.

First, as Torres anticipates in his brief at 12, since the motion in the district court was not made prior to trial, Torres is specifically barred from raising it during trial or at this time. Rule 12(b)(2), Federal Rules of Criminal Procedure;* *see United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir.), *cert. denied*, 429 U.S. 819 (1976).

Torres' motion, premised upon the alleged submission of prejudicial material to the grand jury and claiming that the indictment is defective, comes squarely within Rule 12(b)(2) requiring that it be raised prior to trial. Thus, defendant's failure to raise the motion prior to trial, when his counsel had the grand jury minutes and was aware of the relevant testimony, (Appellant's Appendix C-3), constitutes a waiver of the claim. *See United States v. Blitz*, *supra*, 533 F.2d at 1344.

Second, "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974). *See United States v. Blitz*, *supra*; *United States v. James*, 493 F.2d 323, 326 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974) and cases cited therein. Here, the validity of the indictment on its face is not in dispute. Thus even if prejudicial evidence had been presented, it

* Rule 12(b)(2) provides:

"(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * *

(2) Defense and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)" (Emphasis added).

would not be a ground upon which to dismiss the instant indictment. As this Court stated in *United States v. Piccini*, 412 F.2d 591, 593 (2d Cir. 1969), *cert. denied*, 397 U.S. 917 (1970):

We will not upset a conviction founded on an indictment based on sufficient legal and probative evidence because other evidence of doubtful admissibility was also before the grand jury.

United States v. James, supra, 493 F.2d at 323. There is no dispute here that sufficient legal and probative evidence was presented to the grand jury in the form of testimony by three eyewitnesses.

Finally, the grand jury testimony was not prejudicial. Contrary to Torres' claim, the complaint against Torres for conspiracy to kill federal officers and foreign officials had not been dismissed either at the time of the two assaults on December 2, 1976, or at the time the grand jury testimony in question was heard on March 2, 1977. The complaint, which was issued by United States Magistrate Martin D. Jacobs on November 17, 1976, was then pending, and its revelation to the grand jury provided the jurors with the reason why Torres was incarcerated on December 2, 1976, when he committed the assaults. Thus, this is simply not a case like *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1973), where the grand jurors were affirmatively misled about the nature of the evidence they heard. Cf. *United States v. Guillette*, 547 F.2d 743, 753 (2d Cir. 1976). Moreover, the complaint established implicitly that a United States Magistrate had determined that there was probable cause to believe that Torres had conspired to kill federal officials, a fact of certain significance in determining Torres' intent and bearing on the significance of his crime. If a grand jury is entitled to consider evidence obtained in violation of the constitution, see *United States v. Calandra, supra*, 414 U.S. at

349-52; *United States v. Blue*, 384 U.S. 251, 255 n. 3 (1966), it may certainly have before it the type of evidence in issue here.

In view of the wide latitude historically accorded grand jury investigations, *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976), the question and answer about which Torres now complains, which related to a small fraction of the testimony of one of three eyewitnesses who appeared before the grand jury, could hardly have prejudiced him. This conclusion is especially true in view of the trial court's finding, after a trial about which Torres does not even claim a procedural error, that Torres was guilty beyond a reasonable doubt of both assaults.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)

: ss.:

County of New York)

SARAH SCHRANK GOLD, being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 21ST day of July 1977
she served ² a copy of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

Richard Rosenkranz, Esq.
66 Court Street
Brooklyn, N.Y.

And deponent further says that she sealed the said en-
velope and placed the same in the mail drop for
mailing outside the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Sarah Schrank Gold

Sworn to before me this

21ST day of July, 1977

Jeanette Ann Graye

JEANETTE ANN GRAYE
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979